

CV 26: CERTIORARI

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Note: Different rules apply throughout to certiorari actions brought by prisoners. See CV 45

1. Definition

*St ex rel Gaster
v Whitcher*
117 Wis. 668 (1903)
14 CJS *Certiorari* §§ 1, 2
(2017)

A. Extraordinary remedy by which Cts exercise supervisory control over inferior tribunals and quasi-judicial bodies and officers

*Mills v Vilas Cty
Bd of Adjustments*
2003 WI App 66, ¶ 15
261 Wis. 2d 598

Issuance of certiorari gives Ct exclusive jurisdiction over dispute, thereby precluding any future agency action until Ct has relinquished jurisdiction

*Winkelman v
Town of Delafield*
2000 WI App 254
239 Wis. 2d 542

B. Certiorari only tests regularity of proceedings before administrative body and cannot be used to compel action

*Guerrero v City of
Kenosha Hous Auth*
2011 WI App 138
337 Wis. 2d 484

1) Equitable relief is not available

2) Damages are not available

*St ex rel Kulike
v Town Clerk*
132 Wis. 103 (1907)

*Acevedo v City of
Kenosha*
2011 WI App 10, ¶ 17
331 Wis. 2d 218

*Weber v Dodge Cty
Planning & Dev Dep't*
231 Wis. 2d 222
(Ct. App. 1999)

*Koenig v Pierce Cty
Dept of Human Servs*
2016 WI App 23, ¶ 30
367 Wis. 2d 633

City of Sauk v Trager
118 Wis. 2d 204 (1984)
*Nodell Inv Corp v
City of Glendale*
78 Wis. 2d 416 (1977)
*Metz v Veterinary
Examining Bd*
2007 WI App 220
305 Wis. 2d 788

*Kmiec v
Town of Spider Lake*
60 Wis. 2d 640 (1973)

City of Sauk v Trager
118 Wis. 2d 204 (1984)

Benson v Gates
188 Wis. 2d 389
(Ct. App. 1994)

C. Proper Party

1) Writ of certiorari must go to the Bd or body whose acts are to be reviewed; otherwise, the Ct cannot obtain jurisdiction either of the subject matter or persons composing the Bd

2) Exceptions

a. Specific statute provides otherwise

b. Ambiguous statutory service requirements together with absence of clear identity of Bd or body

c. Examples include a panel that has no formal name or clear statutory identity or that does not appear to be a continuing entity

D. Generally requires exhaustion of administrative remedies

1) Ct need not apply doctrine when a good reason exists

2) Good reasons:

a. Administrative body does not have authority to provide remedy sought

b. Party who failed to exhaust would have no judicial review in circumstances that would be harsh or unfair

c. Agency has already informed party of its position on question of law and facts are not disputed

2. Purpose

*St ex rel Milw Med Coll
v Chittenden*
127 Wis. 468 (1906)
14 CJS Certiorari §§ 1, 2
(2017)

A. Allows Ct to examine record underlying final quasi-judicial determination to review questions of jurisdiction

*Voters with Facts v
City of Eau Claire*
2018 WI 63, ¶ 5
382 Wis. 2d 1
*Donaldson v
Bd of Comm'rs*
2004 WI 67
272 Wis. 2d 146

B. Agency's or municipality's legislative decisions may be reviewed in limited circumstances, such as when there are no statutory provisions for judicial review of legality of municipality's legislative decision

3. Jurisdiction

Wis Const art VII, § 8
§ 753.03
§ 781.01

A. Within general jurisdiction of Circuit Ct

*St ex rel Kulike
v Town Clerk*
132 Wis. 103, 105 (1907)
*Acevedo v
City of Kenosha*
2011 WI App 10
332 Wis. 2d 218

B. Failure to direct writ to Bd or body whose acts are to be reviewed may result in loss of personal and subject-matter jurisdiction

*State ex rel Kaczowski
v Bd of Fire & Police
Comm'rs*
33 Wis. 2d 488,
496 (1967)

C. Certiorari not available when exclusive statutory procedure for judicial review exists

4. Commencement

A. Three procedures for certiorari

1) Non-writ procedure

§ 781.01

a. Remedy of certiorari available as interim or final relief in action or proceeding governed by rules of civil procedure without use of writ

§ 781.01

• Use of non-writ procedure does not alter nature of remedy or scope of proceedings

Bergstrom v Polk Cty
2011 WI App 20
331 Wis. 2d 678

b. Personal service requirements of § 801.11 must be complied with

- Special circumstances exception for service does not apply in certiorari action commenced by summons and complaint

c. Temporary relief

§ 781.02

- Plaintiff may request temporary relief by motion

§ 781.02

- Procedure for motion requesting temporary relief governed by § 801.15(4), except

— Ct may rule ex parte on motion, if plaintiff establishes an emergency exists

d. Transmittal of record

§ 781.03(1)

- Def must transfer record to be reviewed to Clerk of Ct in which action is pending, or

§ 781.03(1)

- Def must notify person in possession of record to be reviewed to transfer record to Clerk of Ct in which action is pending

§ 781.03(2)

- If petitioner is incarcerated, see CV 45

St ex rel McMillian v Dickey
132 Wis. 2d 266, 279
(Ct. App. 1986)

- Failure to transmit complete record remedied by contempt, mandamus, or habeas corpus

2) Writ procedure

a. Pleadings

St ex rel Anderton v Sommers
242 Wis. 484 (1943)

- Petition and supporting memorandum filed in Ct with supervisory jurisdiction

Durkin v Bd of Police & Fire Comm'rs
48 Wis. 2d 112, 118-19
(1970)

- Improper caption is formal defect that may be cured by amendment, provided

— Original pleadings are sufficient to invoke jurisdiction of Circuit Ct

CV 26-4
(2023)

*St ex rel A Hynek & Sons
v Bd of Appeals*
267 Wis. 309, 315b
(1954)

- Opposing party had notice of issues to be determined
- Objections to regularity of appeal waived by opposing party's participation in proceedings
- Every jurisdictional defect on which petitioner intends to rely must be set forth in petition
- Ct may order response and hearing
 - Return to certiorari may be enforced by proceedings as for contempt
 - Failure to respond does not admit allegations of petition

b. Allowance of writ

§ 757.675(2)(c)

- Writ may be allowed by Supplemental Ct Comm'r
 - Returnable to a Judge
 - Returnable at a time set by Judge or Judge's clerk

*St ex rel Chicago
& NW Ry v Burnell*
102 Wis. 232 (1899)

*St ex rel City of
Sheboygan v
Bd of Supervisors*
194 Wis. 456, 462 (1928)

- Allowance of writ does not vacate decision challenged, but suspends execution of decision
- If execution is already in progress, execution is not stayed, unless order to that effect is made by Ct issuing writ
 - May require bond

§ 753.04

c. Form of writ

- In name of State
- Date of issue
- Attested in name of Judge

- Returnable on day certain within 60 days, unless otherwise directed by law, rule of Ct, or Judge
- May be addressed to clerk of Cty, town, city, or village, if record is in clerk's official custody

d. Return to writ

*St ex rel City of Augusta
v Losby*
115 Wis. 57 (1902)

*St ex rel Grant Sch Dist
v School Bd*
4 Wis. 2d 499 (1958)
Nehrling v St ex rel Thal
112 Wis. 637 (1902)

§ 802.05
*St ex rel Campbell v
Tnshp of Delavan*
210 Wis. 2d 239
(Ct. App. 1997)

*Merkel v
Village of Germantown*
218 Wis. 2d 572, 579
(Ct. App. 1998)

*St ex rel McMillian
v Dickey*
132 Wis. 2d 266, 279
(Ct. App. 1986)

- Return is production of official record in its entirety or certified copy of it
- No extraneous evidence, affidavits, or proofs are admissible to supplement or impeach official record

— Return that includes materials extraneous to the hearing record subject to sanctions

- Return may not raise theory of law different from that presented to the Bd

- Failure to make return may entitle petitioner to relief via contempt, mandamus, or habeas corpus

e. Motion to quash or supersede writ

*St ex rel Casper
v Bd of Trustees*
30 Wis. 2d 170 (1966)

*Lakeshore Dev Corp
v Plan Comm'n*
12 Wis. 2d 560 (1961)

*Lakeshore Dev Corp
v Plan Comm'n*
12 Wis. 2d 560 (1961)

*St ex rel Czopiewski
v Milw CSC*
54 Wis. 2d 535 (1972)

- May be filed either before or after return to writ

- Purpose of motion to quash

— Motion admits arguendo facts of petition

— Motion challenges legal sufficiency of complaint

— Motion may raise issues of fact susceptible of proof by evidence outside record

— Example: Whether petitioner guilty of laches

3) Complaint and order

- a. Complaint must demand and specify the remedy
- b. Service of an authenticated copy of the complaint and an order signed by the Judge is made on Def within the time specified in the order
- c. The order may specify a time period shorter than that allowed by § 802.06 for filing an answer or other responsive pleading
- d. Certiorari action commenced when the plaintiff files the complaint and requests an order from the Ct under the statute, not the date the Judge signs the order
- e. Sec. 801.02(1) and (5) indicate that a complaint must be filed within 30 days, whereas a writ must be served within 30 days

*Koenig v Pierce Cty Dept
of Human Servs*
2016 WI App 23, ¶ 26
367 Wis. 2d 633

B. Timeliness

Collins v Policano
231 Wis. 2d 420, 438
(Ct. App. 1999)

- 1) Common-law certiorari must be filed within 6 months after action sought to be reviewed
- 2) Statutory certiorari time for appeal governed by applicable statute. *See Sec. 7.B., infra*

§ 801.02(5)
Tobler v Door Cty
158 Wis. 2d 19 (1980)

C. Three ways to commence (statutory or common law)

1) Summons and complaint

§ 801.02(1)
Bergstrom v Polk Cty
2011 WI App 20
331 Wis. 2d 678

*DNR v Walworth Cty
Bd of Adjustment*
170 Wis. 2d 406, 416
(Ct. App. 1992)

*St ex rel Kurtzweil v
Sawyer Cty Bd of
Appeals*
2023 WI App 43
___ Wis. 2d ___

- a. Service of summons and complaint pursuant to § 801.11
- b. Filing date is date of commencement (provided service is accomplished in the appropriate time period)
- c. If summons and complaint is used as the method and is served, then Def must answer within statutory time frame

2) Writ

§ 801.02(5)

*DNR v Walworth Cty
Bd of Adjustment*
170 Wis. 2d 406, 416
(Ct. App. 1992)

- a. Service of appropriate writ on Def named in writ, if copy is filed immediately
- b. Service date is date of commencement (service must be timely—see **Sec. 7.B.** below)

3) Complaint and order

§ 801.02(5)

*DNR v Walworth Cty
Bd of Adjustment*
170 Wis. 2d 406, 416
(Ct. App. 1992)

§ 801.02—Judicial
Council Note, 1981

- a. Filing complaint demanding and specifying remedy, if service of authenticated copy of complaint and of order signed by Judge is made on Def within time specified in order
- b. Def must be served within time specified in order
- c. Filing date is date of commencement (provided service is accomplished in specified time)
- d. Order may be used for shortening time to file response. This option is for emergency situation when case may become moot before response is filed

- 4) If the certiorari action arises from a denial of a residential development application for approval, then special procedures apply under § 781.10

*Town of Delafield
v Winkelman*
2004 WI 17, ¶ 30
269 Wis. 2d 109

Hanlon v Town of Milton
2000 WI 61, ¶ 23
235 Wis. 2d 597

5. Traditional Standards for Certiorari

NOTE: These standards also apply to statutory certiorari unless applicable statute provides otherwise. See **Sec. 7.D.** below.

A. Did Bd keep within its jurisdiction?

*St ex rel Ruthenberg v
Annuity & Pension Bd*
89 Wis. 2d 463, 472
(1979)

Did Bd act within the scope of its powers?

B. Did Bd act according to law?

*Bratcher v Housing Auth
of Milwaukee*
2010 WI App 97, ¶ 11
327 Wis. 2d 183

- 1) According to "law" includes the common-law concepts of due process and fair play: a hearing must provide minimal due-process or fair-play standards

*St ex rel Ruthenberg v
Annuity & Pension Bd*
89 Wis. 2d 463, 473
(1979)

- 2) Did Bd follow applicable statutes and due-process requirements?

Hanlon v Town of Milton
2000 WI 61
235 Wis. 2d 597

- 3) Did Bd violate the petitioner's constitutional right to equal protection?

*St ex rel Wasilewski
v Bd of Sch Dirs*
14 Wis. 2d 243 (1961)

- 4) Did Bd follow its own rules of procedure?

C. Were Bd's actions arbitrary, oppressive, or unreasonable, representing its will and not its judgment?

*St ex rel Ruthenberg v
Annuity & Pension Bd*
89 Wis. 2d 463, 473
(1979)

- 1) Did Bd act without a rational basis for the exercise of discretion?

*St ex rel Campbell v
Tnshp of Delavan*
210 Wis. 2d 239
(Ct. App. 1997)

- 2) Determination will be set aside when Bd disregarded uncontroverted evidence

*Williams v Housing Auth
of Milwaukee*
2010 WI App 14, ¶ 10
323 Wis. 2d 179

- 3) Was the Bd's decision founded on sufficient evidence?

D. Was evidence such that it might reasonably make the order in question?

*St ex rel Ruthenberg v
Annuity & Pension Bd*
89 Wis. 2d 463, 473
(1979)

- 1) This question applies the substantial evidence standard

*Oneida Seven
Generations Corp v
City of Green Bay*
2015 WI 50, ¶ 43
362 Wis. 2d 290

- a. Substantial evidence is evidence of such convincing power that reasonable persons could reach the same decision as the agency

*Oneida Seven
Generations Corp v
City of Green Bay*
2015 WI 50, ¶ 43
362 Wis. 2d 290

b. Substantial evidence means credible, relevant, and probative evidence on which reasonable persons could rely to reach a decision

*Oneida Seven
Generations Corp v
City of Green Bay*
2015 WI 50, ¶ 44
362 Wis. 2d 290

c. Although substantial evidence is less than a preponderance of the evidence, it is more than a mere scintilla of evidence and more than conjecture and speculation

*Oneida Seven
Generations Corp v
City of Green Bay*
2015 WI 50, ¶ 45
362 Wis. 2d 290

d. Ct conducting a certiorari review should take into account all the evidence in the record

*Oneida Seven
Generations Corp v
City of Green Bay*
2015 WI 50, ¶ 45
362 Wis. 2d 290

e. Reviewing Ct should consider the context of the evidence when determining whether it supports a Bd's action

*St ex rel Ruthenberg v
Annuity & Pension Bd*
89 Wis. 2d 463, 473
(1979)

2) There is a presumption that the Bd acts according to law and the official decision is correct

*St ex rel Ruthenberg v
Annuity & Pension Bd*
89 Wis. 2d 463, 473
(1979)

3) Weight and credibility of the evidence cannot be assessed

*Oneida Seven
Generations Corp v
City of Green Bay*
2015 WI 50, ¶ 44
362 Wis. 2d 290
*Gehin v
Wis Group Ins Bd*
2005 WI 16
278 Wis. 2d 111
*Williams v Housing Auth
of Milwaukee*
2010 WI App 14, ¶ 14
323 Wis. 2d 179

4) Uncorroborated written hearsay alone (when contradicted by in-person testimony) will not support Bd's decision

*St v Outagamie Cty
Bd of Adjustment*
2001 WI 78
244 Wis. 2d 613

5) If any reasonable view of the evidence would sustain the findings of the Bd, the findings are conclusive

E. Decision of Bd must contain reasons for action taken

*Lamar Cent Outdoor, Inc
v Bd of Zoning Appeals*
2005 WI 117
284 Wis. 2d 1

- 1) Not sufficient for Bd to give its reasons in words of statute

*Oneida Seven
Generations Corp v
City of Green Bay*
2015 WI 50, ¶ 48
362 Wis. 2d 290

- 2) Written decision not required as long as reasoning is clear from transcript of the proceeding

*Block v Waupaca Cty Bd
of Zoning Adjustment*
2007 WI App 199, ¶ 7
305 Wis. 2d 325

- 3) If Bd's written decision is insufficient, Ct turns to transcript of Bd's proceedings to determine whether it has adequately expressed its reasoning

6. Common-Law Certiorari

A. Common-law certiorari is discretionary

*St ex rel Damerow
v Behrens*
11 Wis. 2d 426 (1960)

- 1) When judicial review is either inadequate or unavailable, action of Bd or comm'n may be reviewed by certiorari

In limited circumstances, statutory appeal and certiorari may both proceed even though issues overlap

*Gentili v Bd of Police
& Fire Comm'rs*
2004 WI 60, ¶¶ 19-43
272 Wis. 2d 1

*St ex rel Smits v
City of De Pere*
104 Wis. 2d 26, 31 (1981)

- 2) When there are statutory provisions for judicial review, certiorari review limited to those legal questions that could not have been raised by way of statutory judicial review

Klinger v Oneida Cty
149 Wis. 2d 838, 844
(1989)

B. Standard of review. When Circuit Ct takes no further evidence, decision of Bd entitled to presumption of correctness and validity

*Steenberg v
Town of Oakfield*
167 Wis. 2d 566, 572
(1992)

- 1) If there is conflicting evidence on an issue the Ct will not substitute its view for that of the Bd

*Sills v Walworth Cty
Land Mgmt Comm*
2002 WI App 111
254 Wis. 2d 538

- 2) Prima facie showing of wrongdoing may justify expansion of record if evidence outside record demonstrates procedural unfairness

C. Requirements for remedy

Outagamie Cty v Smith
38 Wis. 2d 24 (1968)

St ex rel Welch
v Chatterton
239 Wis. 523 (1942)
St ex rel Sullivan
v Drake
130 Wis. 152 (1906)

St ex rel Smits v
City of DePere
104 Wis. 2d 26 (1981)

- 1) Final determination by quasi-judicial tribunal subject to supervisory control by Ct
- 2) Petitioner was party to proceedings below or is directly and substantially harmed by determination
- 3) Lack of adequate alternative remedy

D. Remedy will not lie, when

St ex rel Badtke
v Sch Bd
1 Wis. 2d 208 (1957)

St ex rel Hron Bros
v Port Washington
265 Wis. 507 (1953)

St ex rel Kaczowski v
Fire & Police Comm'rs
33 Wis. 2d 488, 500
(1967)

St ex rel Damerow
v Behrens
11 Wis. 2d 426 (1960)

Collins v Policano
231 Wis. 2d 420, 438
(Ct. App. 1999)

- 1) Alleged error is in exercise of discretion, not in existence of jurisdiction to exercise it
- 2) Error is minor and Ct interference would only complicate matters further
- 3) Statutory provision for judicial review is adequate to review questions of law
- 4) Petitioner is guilty of laches

In absence of statute, petition must be brought within 6 months after decision complained of or accrual of petitioner's right to relief

7. Statutory Certiorari

St ex rel Casper
v Bd of Trustees
30 Wis. 2d 170 (1966)

Bettendorf v
St Croix Co Adj Bd
188 Wis. 2d 311
(Ct. App. 1994)

Miswald v
Waukesha Cty Bd of Adj
202 Wis. 2d 401
(Ct. App. 1996)

A. Statutory certiorari may be matter of right

B. Timeliness

- 1) Time limit to seek certiorari review begins to run only after final Bd decision

*Bettendorf v
St Croix Co Adj Bd*
188 Wis. 2d 311
(Ct. App. 1994)

- 2) Reconsideration does not extend time for filing unless reconsideration raises new issue

C. Provides express right of Ct review of certain determinations by certiorari

*Browndale Int'l
v Bd of Adj*
60 Wis. 2d 182, 198
(1973)

- 1) Statutory language may change scope and purpose of review as well as applicable procedures

*Berschens v
Town of Prairie du Sac*
76 Wis. 2d 115 (1977)

- a. When statutory provision does not enlarge scope of review, review by statutory certiorari co-extensive with that under common-law writ

*State ex rel Brookside
Poultry Farms, Inc v
Jefferson Cty Bd of Adj*
131 Wis. 2d 101 (1986)

- b. When Ct takes no new evidence upon review, standard of review is same as for common-law certiorari

§ 59.694(10)(a)
§ 62.23(7)(e)10.a.

- c. Some statutes permit Ct to supplement record below

D. Statutes conferring specific jurisdiction

§ 40.08(12)

- 1) Wisconsin Employee Trust Funds Bd

§ 59.694(10)

- 2) Cty zoning

§ 60.03

- 3) Town organization and dissolution

§ 61.35

- 4) Village zoning

§ 62.23(7)(e)
§ 68.13(1)

- 5) City zoning

§ 68.13(1)

- 6) Municipal administrative review

§ 70.47(13), (16)(a)
§ 70.85

- 7) Property tax valuations

§ 82.16
*Dawson v
Town of Jackson*
2011 WI 77, ¶¶ 64-72
336 Wis. 2d 318

- 8) Highway orders—contest of highway orders is by certiorari, not declaratory judgment

§ 801.50(5)

- 9) Venue for probation, extended supervision, and parole revocation review, and denial by a program review committee under § 302.113(9g) of a petition for modification of a sentence

§ 814.08(2)

- 10) Costs on review of Municipal Ct judgment

8. Judgment and Appeal

Wilusz v Witek
258 Wis. 397 (1951)

- A. Granting motion to quash writ usually has same effect as affirming proceedings below**

*St ex rel Park Plaza
v O'Malley*
59 Wis. 2d 217 (1973)

- B. In some statutory writ proceedings, issuance of writ mandatory and should not be quashed**

Proper procedure is to affirm proceedings below

*St ex rel McDiarmid
v Knight*
172 Wis. 138 (1920)

- C. Ct can only affirm or reverse, in whole or in part, determination below**

- 1) No power to amend or cure defects in proceedings below

§ 59.694(10)
§ 62.23(7)
*Browdale Int'l
v Bd of Adj*
60 Wis. 2d 182 (1973)

- 2) Statutory exceptions to this rule

*St ex rel Momon
v Milw CSC*
61 Wis. 2d 313, 320
(1973)
St ex rel Lomax v Leik
154 Wis. 2d 735
(Ct. App. 1990)

- 3) If Ct reverses as to one of several bases for determination below, it may remand to lower tribunal for reconsideration of its action in light of Ct's decision

*Merkel v
Village of Germantown*
218 Wis. 2d 572, 578
(Ct. App. 1998)

- 4) Generally, reviewing Ct may affirm or reverse Bd action, but may not order the Bd to perform a certain act

*St ex rel Smits v
City of DePere*
104 Wis. 2d 26 (1981)

- 5) Ct may set parameters for Bd on remand

*Westel-Milwaukee Co
v Walworth Cty*
205 Wis. 2d 244
(Ct. App. 1996)

Remand with directions appropriate when record insufficient to address issues raised

CV 26-14
(2023)

*Tetra Tech EC, Inc v
Dep't of Revenue*
2018 WI 75, ¶ 11 n8
382 Wis. 2d 496
See also § 227.57(11)

D. Lower tribunal's legal interpretation not binding upon reviewing Ct

In *Tetra Tech EC, Inc v Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496, a majority of the Wis Supreme Ct ended the long-held practice of Cts deferring to administrative agencies' interpretation of statutes and regulations under certain conditions. See Note discussing the case in **CV 30, Sec. 11.G**. Footnote 8 of the lead opinion states that "[t]his decision applies to judicial review of all administrative agency decisions"

*St ex rel Pittsburgh
Coal Co v Patterson*
138 Wis. 475 (1909)

E. Since only questions of law are presented, judgment need not recite formal findings and conclusions

*Clark v Waupaca Cty
Bd of Adjustment*
186 Wis. 2d 300
(Ct. App. 1994)
Busse v City of Madison
177 Wis. 2d 808, 813
(Ct. App. 1993)

F. If Ct's decision on one issue is dispositive of case, other issues raised need not be reviewed

G. Ct may order that copy of judgment be certified to clerk of Bd below, whose duty it then becomes to proceed according to its terms and directions

H. Board may reconsider its decision

*Schoen v Bd of Fire &
Police Comm'rs*
2015 WI App 95, ¶¶ 15-
22, 366 Wis. 2d 279

1) A quasi-judicial body has the inherent authority to reconsider a decision based on an error of law

*Schoen v Bd of Fire &
Police Comm'rs*
2015 WI App 95, ¶ 19
366 Wis. 2d 279

2) The authority to reconsider a decision based on error is implicit in such grant of authority to a quasi-judicial body

*Schoen v Bd of Fire &
Police Comm'rs*
2015 WI App 95, ¶ 19
366 Wis. 2d 279

3) Quasi-judicial body is defined as having a partly judicial character by possession of the right to hold hearings on and conduct investigations into disputed claims and alleged infractions of rules and regulations and to make decisions in the general manner of Cts

*Schoen v Bd of Fire &
Police Comm'rs*
2015 WI App 95, ¶ 20
366 Wis. 2d 279

- 4) It is a fundamental and basic principle of administrative agency law that an administrative agency has the power to reconsider its own decisions since the power to decide carries with it the power to reconsider

I. Enforcement of writ of certiorari

*Winkelman v
Town of Delafield*
2000 WI App 254
239 Wis. 2d 542

- 1) Separate enforcement action with service of summons and complaint or writ required to obtain personal jurisdiction. Motion brought as part of original certiorari proceeding is insufficient

*State ex rel Iushewitz
v Milw Cty Pers Rev Bd*
176 Wis. 2d 706 (1993)

- 2) Use of mandamus

- 3) Zoning violations

*Town of Delafield
v Winkelman*
2004 WI 17
269 Wis. 2d 109

- a. Imposition of forfeiture, or

Forest City v Goode
219 Wis. 2d 654 (1998)

- b. Equitable relief—injunction, abatement, or estoppel defense

*Town of Delafield
v Winkelman*
2004 WI 17
269 Wis. 2d 109

- Although certiorari Ct may not weigh equity, Ct hearing enforcement action retains equitable power to deny enforcement

J. Appeal

St ex rel Cox v DHSS
105 Wis. 2d 378, 380
(Ct. App. 1981)

- 1) Standard of appellate review is same as that in Trial Ct

*St ex rel Wis River
Power Co v Bd of Rev*
125 Wis. 2d 94
(Ct. App. 1985)

- 2) Ct of Appeals not bound by Trial Ct decision

PROHIBITION

MANDAMUS/
PUBLIC

HABEAS
CORPUS

ADMIN REVIEW

EMINENT

ZONING

UNEMPLOYMENT

WORKERS

CH 227

HABEAS
CORPUS

CERTIORARI

WRIT

CV 27: HABEAS CORPUS

1. Scope of Remedy	CV 27-1
2. Persons Eligible to Seek Habeas Corpus.....	CV 27-3
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1. Scope of Remedy

A. Definition

*St ex rel L'Minggio
v Gamble*
2003 WI 82, ¶ 18
263 Wis. 2d 55

- 1) Extraordinary remedy issued in civil action as equitable relief when authority restraining a person constitutionally or jurisdictionally defective

Maier v Byrnes
121 Wis. 2d 258
(Ct. App. 1984)

Remedial statute, liberally construed

*St ex rel Kanieski
v Gagnon*
54 Wis. 2d 108, 112
(1972)

- 2) Habeas corpus is collateral action normally used to raise questions concerning

*St ex rel Kanieski
v Gagnon*
54 Wis. 2d 108, 112
(1972)
In re Graham
74 Wis. 450 (1889)

- a. Subject-matter or personal jurisdiction of convicting Ct

*St ex rel Kanieski
v Gagnon*
54 Wis. 2d 108, 112
(1972)
Babbitt v St
23 Wis. 2d 446, 452
(1964)

- b. Validity of conviction against charge that law under which Def convicted is void

*St ex rel Kanieski
v Gagnon*
54 Wis. 2d 108, 112
(1972)
Babbitt v St
23 Wis. 2d 446, 452
(1964)

- c. Constitutional defects in conviction process

St v Ramey
121 Wis. 2d 177
(Ct. App. 1984)

- d. Constitutional defects in probation revocation process; e.g., ineffective assistance of counsel at revocation hearing

St ex rel Reddin v Galster
215 Wis. 2d 179
(Ct. App. 1997)

*St ex rel Wohlfahrt
v Bodette*
95 Wis. 2d 130
(Ct. App. 1980)

St ex rel Dowe v Cir Ct
184 Wis. 2d 724 (1994)

Wolke v Fleming
24 Wis. 2d 606, 613
(1964)
In re Milburn
59 Wis. 2d (1883)

*St ex rel Kanieski
v Gagnon*
54 Wis. 2d 108, 112
(1972)

St v Langston
53 Wis. 2d 228, 231
(1971)
Carrillo v US
332 F.2d 202
(10th Cir. 1964)

St v Langston
53 Wis. 2d 228, 231
(1971)
Carrillo v US
332 F.2d 202, 203
(10th Cir. 1964)

*St ex rel Zdanczewicz
v Snyder*
131 Wis. 2d 147 (1986)

*See Wis Const art VII,
§ 8*

In re Ziegler
245 Wis. 453, 454 (1944)

JV v Barron
112 Wis. 2d 256, 260
(1983)

CV 27-2
(2023)

- If not constitutional challenge, review must be by certiorari

e. Validity of criminal complaint and bindover

- Not available to attack bindover

3) Remedy of habeas corpus does not perform function of appeal or writ of error

a. Ordinary judicial errors are not considered

b. Remedy not normally used to challenge sufficiency of evidence supporting guilty verdict, unless guilty verdict based on no evidence at all

c. Remedy not normally available to challenge erroneous admission of evidence at trial

d. Remedy not available to challenge improper jury instructions at trial

e. Questions regarding application of exclusionary rule not appropriate for review

4) Privilege of habeas corpus cannot be suspended

B. Purpose

1) To require petitioner to be brought before Ct to determine whether unlawfully imprisoned or restrained of personal liberty

2) To protect and vindicate person's right of personal liberty by freeing from illegal restraint

2. Persons Eligible to Seek Habeas Corpus

*St ex rel Haas
v McReynolds*
2002 WI 43, ¶ 12
252 Wis. 2d 133

Party seeking habeas corpus relief must be:
restrained of liberty; restraint imposed is without
jurisdiction or contrary to Constitution; and party
must have no other adequate remedy

§ 782.01
§ 782.02

A. Petitioner must be “restrained” of liberty

St ex rel Hake v Burke
21 Wis. 2d 405 (1963)
St ex rel Clifton v Young
133 Wis. 2d 193
(Ct. App. 1986)

- 1) Person denied parole on basis of improper release date calculation

§ 976.03(10), (20)

- 2) Person arrested under warrant for extradition may seek habeas corpus to test validity of arrest

St ex rel Kohl v Kubiak
255 Wis. 186 (1949)

Person may not test validity of criminal charges issued
by state demanding extradition

*St ex rel Wohlfahrt
v Bodette*
95 Wis. 2d 130
(Ct. App. 1980)

- 3) Pretrial release on personal recognizance sufficient
“restraint” to give petitioner standing to seek remedy

§ 782.01(2)
*St ex rel Jones
v Gerhardstein*
141 Wis. 2d 710 (1987)
*St ex rel Watts
v Combined Cmty
Servs Bd*
122 Wis. 2d 65 (1985)

- 4) Any person confined in hospital or institution as
mentally ill or committed for treatment or protective
placement may prosecute remedy

§ 48.15, 938.15
JV v Barron
112 Wis. 2d 256 (1983)
Anderson v Anderson
36 Wis. 2d 455 (1967)

- 5) In Wis, habeas corpus lies to adjudicate legal custody of
minor children and Juvs

St ex rel Kelley v Posner
91 Wis. 2d 301
(Ct. App. 1979)

- 6) Person who has posted deposit for traffic violation not
restrained of personal liberty and not entitled to seek
writ

B. Restraint must be without jurisdiction or contrary to Constitution

In re Graham
74 Wis. 450 (1889)

- 1) Habeas corpus traditionally reached only jurisdictional
defects, including

St ex rel Dore v Stoltz
42 Wis. 2d 534, 538
(1969)
Wolke v Fleming
24 Wis. 2d 606, 614
(1964)
St ex rel Cornellier
v Black
144 Wis. 2d 745, 750
(Ct. App. 1988)

St ex rel Dore v Stoltz
42 Wis. 2d 534, 538
(1969)
St ex rel McCaffrey
v Shanks
124 Wis. 2d 216
(Ct. App. 1985)

St ex rel Warrender v
Kenosha Cty Ct
67 Wis. 2d 333 (1975)

St v Smith
131 Wis. 2d 220 (1986)
St ex rel Zdanczewicz
v Snyder
131 Wis. 2d 147 (1986)

Pepin v
St ex rel Chambers
217 Wis. 568, 575-76
(1935)

Servonitz v St
133 Wis. 231 (1907)

Michigan v Doran
99 S. Ct. 530 (1978)
St v Stone
111 Wis. 2d 470, 474
(1983)
St ex rel Reddin
v Meekma
102 Wis. 2d 358, 362-63
(1981)

St ex rel Ehlers
v Endicott
188 Wis. 2d 57
(Ct. App. 1994)

a. Validity of criminal complaint

b. Validity of bindover after prelim

c. Personal jurisdiction of Ct, when

- Complaint is insufficient, and
- Petitioner has not waived objection to personal jurisdiction
- Illegal arrest no longer deprives Ct of jurisdiction

d. Whether prosecution was barred by statute of limitation

e. Whether judgment based on unconstitutional statute

f. Validity of extradition documents

- Whether extradition documents facially adequate

Babbitt v St
23 Wis. 2d 446, 452
(1964)

*St ex rel Warrender
v Kenosha Cty Ct*
67 Wis. 2d 333, 339
(1975)

St ex rel Derber v Skaff
22 Wis. 2d 269 (1964)

St ex rel Burnett v Burke
22 Wis. 2d 486 (1964)

St ex rel White v Gray
58 Wis. 2d 285 (1973)

St v Johnson
101 Wis. 2d 698, 703
(Ct. App. 1981)

St v Johnson
101 Wis. 2d 698, 703
(Ct. App. 1981)

St ex rel Clifton v Young
133 Wis. 2d 193
(Ct. App. 1986)

St v Evans
2004 WI 84, ¶ 4
273 Wis. 2d 192
*St ex rel Santana
v Endicott*
2006 WI App 13, ¶ 4
288 Wis. 2d 707

St ex rel Hager v Marten
226 Wis. 2d 687 (1999)

*St ex rel Haas
v McReynolds*
2002 WI 43, ¶¶ 14-15
252 Wis. 2d 133

Smith v St
33 Wis. 2d 695, 702-03
(1967)

- Whether petitioner is fugitive charged with crime in demanding state
- 2) Modern view is that habeas corpus will redress constitutional as well as jurisdictional defects, including
 - a. Ruling on motion to suppress evidence on constitutional grounds, when other legal remedies are inadequate
 - b. Validity of waiver of jury trial
 - c. Validity of waiver of Atty
 - d. Voluntariness of plea
 - e. Whether execution of sentence is proper
 - Validity of computation of "good time" credit
 - f. Validity of administrative rule relating to criminal prosecutions, e.g., probation revocation rules
 - g. Ineffective assistance of appellate counsel in lieu of § 974.06 motion (See **Sec. 3.D., *infra***, and **Ineffective Assistance of Counsel, Criminal Benchbook, CR 41**)
 - h. Issues of statutory construction in context of constitutional or jurisdictional defects

C. Another remedy not available

- 1) If other remedy available
- 2) Constitutional issues cannot be raised on habeas corpus when time for appeal or writ of error has not yet expired

§ 974.06(8)
St v Escalona-Naranjo
185 Wis. 2d 168 (1994)

3) Remedy of habeas corpus not available unless petitioner has first used any adequate § 974.06 postconviction motion

- a. § 974.06 procedures supplant habeas corpus remedy in more convenient forum, Ct of conviction
- b. § 974.06 motions are specific statutory remedies to challenge validity of judgment of conviction and sentence, not validity of custody itself

§ 782.46

4) Remedy of habeas corpus not available to prisoners passing through Wis

St ex rel Reynolds
v Kenosha Cty Ct
11 Wis. 2d 560 (1960)

5) Remedy of habeas corpus not available when matter to be reviewed has been or is being heard in concurrent Ct on habeas corpus

St v Pozo
2002 WI App 279
258 Wis. 2d 796

6) Remedy of habeas corpus not available when petitioner asserts claim that could or should have been raised in prior proceeding or that was previously litigated in prior proceeding

3. Subject-Matter Jurisdiction

Wis Const art VII, § 8
§ 753.03
§ 781.01

A. Subject-matter jurisdiction is within general jurisdiction of Circuit Cts

JV v Barron
112 Wis. 2d 256 (1983)

- 1) Circuit Cts must exercise jurisdiction even though petitioner confined pursuant to order or judgment of Circuit Ct
- 2) Comity is insufficient justification to refuse remedy

B. Authority to grant habeas corpus remedy also conferred by

§ 48.15

1) Children's Code

§ 51.45(13)(m)

2) Mental Health Act

§ 938.15

3) Juvenile Justice Code

§ 976.03(10), (27)(a)

4) Uniform Criminal Extradition Act

§ 976.05

5) Interstate Agreement on Detainers

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(2023)

St v Theoharopoulos
72 Wis. 2d 327 (1976)

St ex rel Santana
v Endicott
2006 WI App 13, ¶ 4
288 Wis. 2d 707

C. State Cts have no jurisdiction to grant habeas corpus remedy on application of person held under claim and color of authority of US by officer of federal government

D. Ineffective assistance of appellate counsel claim must be brought in appellate Ct

4. Venue

A. Within Cty where petitioner detained

§ 782.03
§ 801.50(4)(b)

St ex rel Le Febre
v Abrahamson
103 Wis. 2d 197, 201
(1981)

St ex rel Le Febre
v Abrahamson
103 Wis. 2d 197, 200-01
(1981)

§ 782.03

1) Application for remedy may be made to any Ct, Justice, Judge, or Circuit or Supplemental Ct Comm'r, except

a. Individual Supreme Ct Justices have no authority to issue remedy, and

b. Supreme Ct Justices normally forward application to Ct of Appeals of district where petitioner resides

2) Exception exists where no Judge within Cty can or will grant remedy

Application may be made to Judge residing in adjoining Cty

§ 801.50(4)(a)

B. If prisoner's conviction or sentence challenged, action must be brought in Cty where prisoner was convicted or sentenced

§ 801.52
St ex rel West v Bartow
2002 WI App 42
250 Wis. 2d 740

C. In proper case, court can grant discretionary change of venue

§ 782.03
§ 782.05

St ex rel Reynolds
v Flynn
180 Wis. 556 (1923)

5. Parties

A. State, on relation of petitioner, is plaintiff

*St ex rel Hellige
v Milw Liedertafel*
166 Wis. 277 (1917)

**B. Person charged with unlawfully restraining
petitioner is at least one Def**

- 1) Any other party interested in continuance of restraint
is potential Def entitled to intervene and be heard
- 2) In criminal cases, DA must be notified of hearing
- 3) Def may be represented by private Atty

§ 781.04(2)
§ 782.26

St ex rel Durner v Huegin
110 Wis. 189 (1901)

6. Non-Writ Procedure

§ 781.01

**A. Remedy of habeas corpus available as interim or
final relief in action or proceeding governed by
rules of civil procedure**

- 1) Remedy of habeas corpus formerly available only by
writ
- 2) Use of non-writ procedure does not alter nature of
remedy or scope of proceedings

§ 781.01

B. Commencement of action

§ 801.02(1)

- 1) Plaintiff files and serves complaint demanding remedy
of habeas corpus together with either

§ 801.02(1)

a. Summons, or

§ 801.02(5)
§ 802.06

b. Order signed by Judge requiring answer less than
45 days after service

- Order may also limit time for service

C. Temporary relief

§ 781.02

- 1) Plaintiff may request temporary relief by motion

§ 781.02

- 2) Procedure for motion requesting temporary relief
governed by § 801.15(4), except

Ct may rule ex parte on motion, if plaintiff establishes
an emergency exists

§ 781.04(1)

D. Ct may admit plaintiff to bail

§ 781.04(2)

E. DA of Cty where action brought must be notified of time and place of hearing, if plaintiff detained upon criminal accusation

7. Writ Procedure

§ 782.04

A. Petition must be verified

§ 782.03

1) Signature of prisoner, or

§ 782.03

2) Signature of person acting on prisoner's behalf

§ 782.04

B. Contents of petition

§ 782.04(1)

1) Averment that person on whose behalf writ applied for is restrained of personal liberty

§ 782.04(1)

2) Identification of person, by whom imprisoned, and place

§ 782.04(2)

3) Averment that person not imprisoned by virtue of judgment, order, or executions specified in § 782.02

§ 782.04(3)

4) Cause or pretense of imprisonment to best of petitioner's knowledge and belief

§ 782.04(4)

5) Copy of order or process authorizing restraint, or averment that such was duly demanded and refused by custodian or could not be demanded by reason of removal or concealment of prisoner

§ 782.04(5)

6) Statement why imprisonment is illegal

§ 782.03

7) If petitioner sentenced to state prison

a. Copy of any § 974.06 motion made and indication of disposition, or

b. Statement that no § 974.06 motion made

PROHIBITION
MANDAMUS/
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DEFENSE
WCA PROCEEDINGS
ADMIN REVIEW
EMINENT
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IHS
WORKERS
COMP
CH 227

§ 782.06

C. Writ

- 1) Ct or Judge to whom petition properly presented must issue writ, unless it appears from petition and attached documents that prisoner not entitled to relief

§ 782.09

JV v Barron
112 Wis. 2d 256 (1983)

Willful refusal of sufficient application makes Judge liable to prisoner for \$1,000

In re Cash
215 Wis. 148 (1934)
St ex rel Reynolds
v Kenosha Cty Ct
11 Wis. 2d 560 (1960)

- 2) Writ need not issue if application clearly shows prisoner not entitled to relief

State ex rel Coleman
v McCaughtry
2006 WI 49
290 Wis. 2d 352

Delay in seeking relief not a bar unless petitioner guilty of laches

§ 782.07

- 3) Writ commands production of prisoner immediately after receipt of writ or at specified time, together with return showing time and cause of imprisonment

Must be signed and dated by Judge or issued by Ct

§ 782.33

D. Warrant in lieu of writ

- 1) If there is cause to believe that prisoner may be removed from State or suffer irreparable injury before habeas corpus relief can be obtained, warrant may be issued in lieu of writ

§ 782.34

- a. If proof also sufficient to justify arrest of prisoner's custodian, warrant may contain order for arrest of such custodian

§ 782.36

- Criminal proceedings may be instituted against custodian

§ 782.35

- 2) Officer or person to whom warrant directed must forthwith bring prisoner (and if so ordered, prisoner's custodian) before Ct

Further proceedings are same as those for habeas corpus

§ 782.10

E. Service of writ

- 1) Writ can only be served by elector of Wis
- 2) Service can be effectuated by
 - a. Delivering copy of writ to person to whom directed
 - b. If such person cannot be found, leaving writ at jail or place of prisoner's confinement with prisoner's custodian, or
 - c. If admittance to place of confinement denied, posting copy of writ in conspicuous place on exterior of that place
- 3) Unless service is by posting, party serving writ on officer must tender statutory fees for delivering prisoner to Ct and give bond if required by officer
- 4) Person serving writ must promptly return proof of service
- 5) Service of writ confers jurisdiction (no summons required) if copy filed forthwith

§ 801.02(5)
St ex rel Jones
v Gerhardstein
141 Wis. 2d 710, 718
(1987)

St ex rel Hellige
v Milw Liedertafel
166 Wis. 277 (1917)

F. Motion to quash

- 1) Respondent may challenge sufficiency of petition by motion to quash writ
- 2) If petition insufficient, Ct enters judgment quashing writ
- 3) If motion to quash denied, respondent must make return

G. Return

§ 782.08

- 1) Failure of writ to identify person with custody of prisoner does not excuse that person's disobedience of writ

§ 782.13
§ 782.15
§ 782.29

2) Any custodian on whom writ served must make return and produce prisoner at time directed, unless prisoner too sick or infirm to be brought before Ct, which fact shall be indicated in verified return

§ 782.16
§ 782.17
§ 782.18

3) Failure to make return is punishable by contempt

4) Return must

§ 782.14(1)

a. State whether respondent has custody of prisoner

§ 782.14(2)

b. State authority for and true cause of imprisonment, if respondent has custody

§ 782.14(3)

c. Include copy of any written authority by which prisoner detained

- Original must be produced at hearing

§ 782.14(4)

d. State to whom custody was transferred and at what time, in addition to cause and authority for transfer, if respondent has transferred custody of person to another

§ 782.14(4)

e. Include signature and oath of respondent

§ 782.26

5) No order for discharge may be made unless interested parties, including DA, given notice. The statute is silent as to the party responsible for giving notice

§ 782.19

H. Traverse of return

1) Prisoner may move to strike return or may answer by denying any material fact pleaded in it

May allege any additional facts entitling prisoner to discharge in verified pleading known as answer or traversal

In re Milburn
59 Wis. 24 (1883)

2) Allegations in return not so denied are admitted

St ex rel Hellige
v Milw Liedertafel
166 Wis. 277 (1917)

3) Alternatively, prisoner may admit facts stated in return but challenge their sufficiency by motion for discharge

CV 27-12
(2023)

I. Hearing

§ 782.19

- 1) If pleadings raise issue of fact, Ct or Judge tries issues in summary way

§ 782.25

- 2) Custody of petitioner during hearing

§ 782.25

§ 782.25

- a. Pending determination of writ, safekeeping of petitioner under direction and authority of Ct
- b. Ct may commit petitioner to custody of sheriff
- c. Ct may place petitioner in such care or custody as circumstances require, including
 - Release of petitioner on bail

St ex rel Reynolds
v Kenosha Cty Ct
11 Wis. 2d 560, 571
(1960)

Smith v Bennett
81 S. Ct. 895 (1961)
Griffin v Illinois
76 S. Ct. 585 (1956)

- 3) Petitioner has right to Atty

§ 782.29

- a. If petitioner indigent, an Atty must be provided on request
- b. If sickness or infirmity prevents appearance, prisoner may appear by Atty

§ 782.26

- 4) If it appears from return that any person in Cty other than respondent has interest in continuing prisoner's restraint, interested person or Atty must be given sufficient notice of time and place at which writ is returnable

§ 782.27

If prisoner detained on any criminal accusation, notice to be given to DA

Booker v Israel
610 F. Supp. 1310, 1314
(E.D. Wis. 1985)

- 5) Burden of proof is on petitioner

St ex rel McMillian
v Dickey
132 Wis. 2d 266
(Ct. App. 1986)

Burden is preponderance of the evidence

6) Ct makes findings of fact and conclusions of law on record

7) Ct makes final order

J. Judgment

§ 782.20
§ 782.23
§ 782.24

*St ex rel LaFollette
v Brown Cty Cir Ct*
37 Wis. 2d 329 (1967)

1) Judgment may order prisoner discharged, admitted to bail, or remanded to custody

2) Discharge reaches no further back than point of error

If prisoner in custody when error occurred, discharge may be limited to current custody and remand to committing Ct

3) Habeas corpus is an equitable remedy

a. Relief not limited to release of person confined

b. Ct may tailor remedy for particular facts

4) Prevailing party not entitled to costs

*St ex rel Memmel
v Mundy*
75 Wis. 2d 276, 288
(1977)
*St ex rel McMillian
v Dickey*
132 Wis. 2d 266, 286
(Ct. App. 1986)

St ex rel Korne v Wolke
79 Wis. 2d 22, 27 (1977)

K. Effect of discharge

§ 782.32

1) Prisoner discharged on writ of habeas corpus may not be restrained again for same cause

§ 782.38
§ 782.39

a. Any person who does so is liable to prisoner for \$1,250 damages and subject to fine of up to \$1,000 and imprisonment for not more than 6 months, or both

b. Following are not deemed same cause

- Re-arrest or resentencing for same criminal offense

§ 782.32(1), (2)
Tell v Wolke
21 Wis. 2d 613 (1963)

§ 782.32(3), (4)

- Re-imprisonment by legal process or new execution in same civil cause or action

§ 782.30

2) Obedience to final order for discharge may be enforced by contempt in same manner as failure to make return to writ

a. Contemnor also liable to prisoner for \$1,250, plus special damages

§ 782.31

b. No officer is liable for obeying any final order of discharge

L. Standard of review

*St ex rel McMillian
v Dickey*
132 Wis. 2d 266, 286
(Ct. App. 1986)

1) Habeas presents mixed question of law and fact

a. Trial Ct's factual findings will be upheld unless clearly erroneous

b. Legal conclusion subject to de novo review

HABEAS
CORPUS

WHITE

PROHIBITION

MANDAMUS/
PUBLIC
RECORDS

SPEC. PROCEEDINGS

ADMIN REVIEW

COMMITMENT

ZONING

UNEMPLOYMENT
INS.

WORKERS
COMP.

CH 227

CV 28: MANDAMUS/PUBLIC RECORDS

1. Definitions.....	CV 28-1
2. Subject-Matter Jurisdiction	CV 28-2
3. Court Discretion.....	CV 28-2
4. Requirements for Remedy	CV 28-3
5. Parties	CV 28-6
6. Non-Writ Procedure.....	CV 28-7
7. Writ Procedure.....	CV 28-8
8. Public Records Procedure—Mandamus.....	CV 28-11

Committee Practice Note: For additional guidance, the Civil Benchbook Committee recommends referring to the Wisconsin DOJ's *Wisconsin Public Records Law Compliance Guide* (Oct. 2019),

<https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/PRL-GUIDE.pdf>.

For a general discussion governing access to court records, see *John Doe 1 v. Madison Metro. Sch. Dist.*, 2021 WI App 60, ¶¶ 19–32, 399 Wis. 2d 102, *aff'd*, 2022 WI 65, 403 Wis. 2d 369.

1. Definitions

§ 19.32

A. “Authority” means any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, council, department, or public body; a governmental or quasi-governmental corporation; a special purpose district; any court of law; the assembly or senate; a nonprofit corporation that receives more than 50% of its funds from a county or municipality and that provides public health or safety services; a university police department; or any formally constituted subunit of these authorities

St ex rel Flynn v Kemper Ctr, Inc
2019 WI App 6,
¶¶ 14–15
385 Wis. 2d 811

B. “Quasi-governmental corporation” determined on totality of circumstances and factors of funding, function, appearance, control, and governmental access to records

*Mt Horeb Cmty Alert v
Vill Bd of Mt Horeb*
2003 WI 100
263 Wis. 2d 544
52 Am Jur 2d
Mandamus
§§ 1, 18 (2021)

C. "Mandamus" is an extraordinary remedy granted on equitable grounds in civil action; directed to some public officer, Bd, corporation, or person; requiring performance of legal duty

2. Subject-Matter Jurisdiction

Wis Const art VII, § 8
753.03

A. Within general jurisdiction of Circuit Ct, but

*Eau Claire Leader-
Telegram v Barrett*
146 Wis. 2d 647
(Ct. App. 1988)

No Circuit Ct has superintending authority over another and cannot issue a writ of mandamus against it

B. Special jurisdictional statutes

§ 16.415(2)

1) Certification of State payrolls

§ 19.37(1)

2) Public records law

§ 19.97(2)

3) Open meetings law

§ 783.03

4) Issues of fact in mandamus proceedings instituted in Supreme Ct

a. Tried in Circuit Ct of Cty where cause of action arose, or

b. Tried in Circuit Ct for such other Cty as Supreme Ct orders, for cause shown

3. Court Discretion

*St ex rel
Cont'l Ins Co
v Doyle*
40 Wis. 220 (1876)

A. No discretion to refuse remedy when invoked on behalf of State in matter *publici juris*

Miller v Smith
100 Wis. 2d 609 (1981)
St ex rel Horton
v Brechler
185 Wis. 599 (1925)
Keane v St Francis Hosp
186 Wis. 2d 637
(Ct. App. 1994)

Lake Bluff Housing
Partners v S Milwaukee
197 Wis. 2d 157 (1995)

B. Discretion to refuse remedy on equitable grounds when remedy invoked to enforce private rights even when legal prerequisites are met

- 1) Erroneous exercise of discretion if premised on erroneous view of the law
- 2) Ct may not use equitable considerations to determine if clear legal right exists

C. Appellate Ct will affirm unless Circuit Ct erroneously exercised its discretion

4. Requirements for Remedy

St ex rel Zignego v
Wis Elections Comm'n
2021 WI 32, ¶ 38
396 Wis. 2d 391

A. Four prerequisites for issuance of writ

- 1) Clear legal right to relief
- 2) Positive and plain duty on part of official or body to whom writ directed
- 3) Substantial damages caused by nonperformance of duty
- 4) No other adequate remedy at law

B. Clear legal right

Eisenberg v DILHR
59 Wis. 2d 98 (1973)

Lake Bluff Housing
Partners v S Milwaukee
197 Wis. 2d 157 (1995)

Neu v Voegel
96 Wis. 489 (1897)

- 1) Must be specific legal right free from substantial doubt
- 2) Ct may not use equitable considerations to determine if clear legal right exists
- 3) Petitioner must not be guilty of laches or otherwise ineligible for equitable relief

C. Positive and plain duty

Nisenberg v DILHR
59 Wis. 2d 98 (1973)
Collins v Policanso
231 Wis. 2d 420
(Ct. App. 1999)

- 1) Mandamus will lie only to compel performance of specific duties imposed by law

St ex rel Bd of Educ v Hunter
111 Wis. 582 (1901)

- 2) Duty must be presently due when application made, except

St ex rel Racine City v Schmidt
7 Wis. 2d 528 (1959)

Remedy can be granted before duty is due, if time required to perform is such that remedy ordered on due date would be ineffectual

St ex rel City of Baraboo v Page
201 Wis. 262 (1930)

- 3) Does not lie to perform mere contractual obligation

Lake Bluff Housing Partners v S Milwaukee
197 Wis. 2d 157 (1995)

- 4) Duty must be clear and free of substantial doubt

Morrisette v DeZonia
63 Wis. 2d 429 (1974)

Ambiguous statute after Ct has construed its meaning may create clear duty

Law Enf Stds Bd v Vill of Lyndon Station
101 Wis. 2d 472 (1981)

- 5) If duty requires exercise of discretion, Ct may not compel action through mandamus

Vretenar v Hebron
144 Wis. 2d 655 (1988)
Galuska v Kornwolf
142 Wis. 2d 733
(Ct. App. 1987)

Mandamus will not direct sheriff or constable to enforce criminal statutes as investigative process is inherently discretionary

St ex rel Redenius v Waggenson
140 Wis. 265 (1909)

- 6) All conditions precedent to duty's performance must be met

St ex rel Hernandez v McConahey
42 Wis. 2d 468 (1969)

- 7) Duty must be one that respondent capable of performing

Pick v Menz v City of Milw
32 Wis. 2d 266 (1966)
Wesbar Stamping Corp
238 Wis. 93 (1941)

- 8) Examples

- a. Mandamus may compel officers of private business corporations to perform their duties

bin-Rilla v Israel
113 Wis. 2d 514 (1983)

- b. Mandamus may lie to redress unconstitutional conditions of penal confinement

St ex rel Ondrasek v Calumet Cir Ct
133 Wis. 2d 177
(Ct. App. 1986)

- c. Mandamus may lie to compel substitution of Judge

St ex rel Iushewitz v Milw Cty Pers Rev Bd
176 Wis. 2d 706 (1993)

- d. Mandamus may be used to enforce a Circuit Ct mandate to an agency pursuant to certiorari review

Mt Horeb Cmty Alert v Vill Bd of Mt Horeb
2003 WI 100
263 Wis. 2d 544
St ex rel Meessmann v Town of Presque Isle
2023 WI App 36
408 Wis. 2d 690
pet for rev filed

- e. Mandamus may be used to compel certain types of municipalities to act on initiative petition pursuant to direct legislation statute

St ex rel Milw Cty Pers Rev Bd v Clarke
2006 WI App 186,
¶¶ 47-49
296 Wis. 2d 210

- f. Mandamus may be used to require compliance with order issued by entity with apparent authority to make such orders

D. Substantial damages

St ex rel Mueller v Powers
64 Wis. 2d 643 (1974)

Petitioner must be substantially damaged by respondent's nonperformance of duty

E. Lack of alternative remedy

St ex rel Wolf v LaCrosse Lutheran Hosp Ass'n
181 Wis. 33 (1923)

- 1) Mandamus not available if wrong can be remedied by ordinary civil action for damages, replevin, specific performance, declaratory relief, etc.

St ex rel Madison Airport Co v Wrabetz
231 Wis. 147 (1939)

- 2) Mandamus not available if adequate administrative remedies have been established by statute

St ex rel Williams v Shaughnessy
202 Wis. 537 (1930)

- 3) Mandamus not available when act complained of can be reviewed by appeal, writ of error, or certiorari

MANDAMUS/
PUBLIC
PERSONS

*Keane v
St Frances Hosp*
186 Wis. 2d 637
(Ct. App. 1994)
*St ex rel Morke v
Record Custodian*
154 Wis. 2d 727
(Ct. App. 1990)

- 4) Mandamus available only if above remedies are not adequate and complete under circumstances of case

5) But note

HABEAS
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bin-Rilla v Israel
113 Wis. 2d 514 (1983)
*St ex rel Staples v
DHSS*
130 Wis. 2d 285
(Ct. App. 1986)

- a. Ct may treat habeas corpus petition or certiorari petition as one for mandamus

*St ex rel Racine Cty
v Schmidt*
7 Wis. 2d 528 (1959)

- b. Ct may grant declaratory relief in mandamus action

5. Parties

A. Relator must be real party in interest

*St ex rel Burnham
v Cornwall*
97 Wis. 565 (1897)

If public right is involved, mere citizenship may confer standing

*St ex rel Hasbrouck
v Milwaukee*
25 Wis. 122 (1869)

B. When duty to be performed is purely official, respondents may be designated by title without specification of names

Remedy will be directed to incumbents of such offices

List v Festge
9 Wis. 2d 297 (1960)

C. Only particular officer or body on whom duty rests is necessary party respondent, but others whose rights may be involved are proper parties

*St ex rel Bowe
v Bd of Educ*
63 Wis. 234 (1885)

D. When duty rests primarily on Bd, it is not necessary to implead its agents and servants who may actually perform duty in its behalf

6. Non-Writ Procedure

§ 781.01

A. Remedy of mandamus is available as interim or final relief in action or proceeding governed by rules of civil procedure

1) Remedy of mandamus formerly available only by writ

§ 781.01

2) Use of non-writ procedure does not alter nature of remedy or scope of proceedings

B. Commencement of action

§ 801.02(1)

1) Plaintiff files and serves complaint demanding remedy of mandamus together with either

§ 801.02(1)

a. Summons, or

§ 801.02(5)
§ 802.06

b. Order signed by Judge requiring answer or other responsive pleading less than 45 days after service (order may also limit time for service)

§ 801.02(5)
—Judicial Council Note,
1981

- Order serves same purposes as alternative writ and order to show cause under writ procedure

§ 801.02(5)
—Judicial Council Note,
1981

- This option is for the emergency situation when case may be moot before a response would be filed

C. Temporary relief

§ 781.02

1) Plaintiff may request temporary relief by motion

§ 781.02

2) Procedure for motion requesting temporary relief governed by § 801.15(4), except

Ct may rule ex parte on motion, if plaintiff establishes an emergency exists

§ 783.03

D. Issues of fact, including damages, may be tried by jury

Corrao v Mortier
7 Wis. 2d 494, 497
(1959)

1) Remedy of mandamus does not include right to damages

Corrao v Mortier
7 Wis. 2d 494, 496-97
(1959)

- 2) Remedy of mandamus may be sought in same action as one for damages

7. Writ Procedure

A. Definitions

- 1) Peremptory writ

Compels performance of respondent's legal duty

- 2) Alternative writ

- a. Requires either performance or showing of cause why performance should not be compelled

- b. Ct may treat petition for order to show cause why peremptory writ should not issue as petition for alternative writ

- c. Ct must issue alternative writ when issues of material fact exist

*Schend v St George's
German Aid Soc'y*
49 Wis. 237, 240-41
(1880)

*Schend v St George's
German Aid Soc'y*
49 Wis. 237, 241 (1880)

B. Pleadings

§ 783.01, § 801.01(2)
Moore v Stahowiak
212 Wis. 2d 744
(Ct. App. 1997)

- 1) Mandamus is a civil action; rules of practice for civil actions apply

- a. Petition for writ of mandamus is analogous to complaint

- b. Return is analogous to an answer

*St ex rel Cabott, Inc
v Wojcik*
47 Wis. 2d 759 (1970)

- 2) Sufficiency of pleadings is tested under rules governing civil actions

*Watkins v
Milwaukee CSC*
88 Wis. 2d 411 (1979)

- 3) Six month time limit for certiorari does not govern mandamus

*Elkhorn Area Sch Dist
v East Troy Sch Dist*
127 Wis. 2d 25
(Ct. App. 1985)

- 4) Doctrine of laches governs mandamus actions

Mandamus is not embraced within statute of limitation

C. Issuance of alternative writ

- 1) Ct issues alternative writ when

- a. Petition establishes prima facie case

- b. Issues of material fact exist

- 2) Form of writ

- a. In name of State bearing date of issue

- b. Attested in name of Judge

- c. Returnable on date certain within 60 days, unless otherwise directed

- d. Signed by Clerk of Ct

- e. Sealed with Ct seal

- f. Directed to person authorized to serve writs

- 3) Formal defects may be disregarded as immaterial when they do not affect substantial rights

- 4) Not necessary that original writ be served upon respondent

- a. Copy will suffice

- b. If writ is directed to Bd, original should be served on chairperson and copies on other members

St ex rel Jones v Oates
86 Wis. 634 (1893)

*St ex rel Drury
v Supervisors of
Town of Lincoln*
67 Wis. 274 (1886)

*St ex rel Havemeyer
v Bd of Supervisors*
22 Wis. 379 (*396)
(1867)

D. Motion to quash

§ 783.01

- 1) Respondent may move to quash writ before time for making return has expired

Motion to quash is deemed motion to dismiss under § 802.06(2)

St ex rel Dame v LeFevre
251 Wis. 146 (1947)

- 2) Motion admits truth of allegations of petition, but challenges their sufficiency

St ex rel Bd of Educ v Hunter
111 Wis. 582 (1901)

- 3) If motion is denied, leave may be given respondent to make return

St ex rel Faber v Hinkel
131 Wis. 103 (1907)

- 4) If motion to quash is granted, but not on merits, action is dismissed without prejudice to again commence for same relief

E. Return

St ex rel Holmes v Baird
11 Wis. 271 (*260)
(1860)

- 1) Unless motion to quash has been granted, respondent must make return within time specified in writ

St ex rel Schroedel v Pagels
257 Wis. 376 (1950)

- 2) Return constitutes answer to petition and is governed by same rules as pleadings in other civil actions
- 3) Petitioner may move to strike return which admits matters pleaded in return but challenges their sufficiency

§ 783.02
St ex rel Town of Spring Lake v Pierce Cty
71 Wis. 321 (1888)

Unless motion to strike is made, defenses alleged in return are deemed controverted

F. Penalty

§ 783.07
§ 939.50(3)(h)

- 1) Whenever public officer or body to perform duty enjoined by peremptory writ without just excuse, Ct may impose penalty for Class H felony: up to 6 years' imprisonment or fine of up to \$10,000, or both

§ 19.37(1)

8. Public Records Procedure—Mandamus

A. Mandamus appropriate remedy if authority withholds or delays access to public record after written request for disclosure

B. Definitions

§ 19.32(3)

*St ex rel Greer
v Stahowiak*
2005 WI App 219, ¶ 8
287 Wis. 2d 795

- 1) "Requester" does not include committed or incarcerated person, unless requested record contains specific references to that person or his/her minor children

§ 801.02(7)

Moore v Stahowiak
212 Wis. 2d 744
(Ct. App. 1997)

- a. If requester is incarcerated person, must exhaust administrative remedies before commencing mandamus action

*St ex rel Greer
v Stahowiak*

2005 WI App 219
287 Wis. 2d 795

- b. Incarcerated person requests analyzed under § 19.35(1)(am); see **Sec. 8.H.**, *infra*

§ 19.32(2)

- 2) "Record" is any material on which information is recorded or preserved, which has been created or is being kept by an authority

Blum v Bd of Educ
209 Wis. 2d 377
(Ct. App. 1997)

- a. Records are "kept" by an authority when in possession of an officer or employee who falls under supervision of the "authority"

§ 19.36(3)

*Bldg &
Constr Trades Council
v Waunakee Sch Dist*
221 Wis. 2d 575
(Ct. App. 1998)

- b. Includes any record produced or collected under contract entered into by the authority

§ 19.32(2)

- c. "Record" does not include drafts and notes prepared for originator's personal use

Stone v Bd of Regents
2007 WI App 223
305 Wis. 2d 679

- d. "Record" does not include identical copies of otherwise available records

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§ 19.32(1)

- 3) "Authority" includes a state or local office, elected official, agency, Bd, or governmental or quasi-governmental corporation that has custody of a record

§ 19.36(3)

WIREData, Inc v Sussex
2008 WI 69
310 Wis. 2d 397

- a. Public body's status as an "authority" may not be avoided by delegating records creation and custody to a contractor

*St v Beaver Dam Area
Dev Corp*
2008 WI 90
312 Wis. 2d 84

- b. Entity is a quasi-governmental corporation if it resembles a government corporation in function, effect, or status

*Wis Prof'l Police Ass'n v
Wis Counties Ass'n*
2014 WI App 106, ¶ 12
357 Wis. 2d 687

- c. An unincorporated not-for-profit association is not an "authority" under § 19.32(1)

C. General provisions

Nichols v Bennett
199 Wis. 2d 268 (1996)

- 1) Nature of document, not its location, determines status under §§ 19.31–.37

*Journal Times v
City of Racine Bd*
2015 WI 56, ¶¶ 55, 73
362 Wis. 2d 577

- 2) Statute does not require custodian to compile statistics or create record

§ 19.36(6)
Osborn v Bd of Regents
2002 WI 83
254 Wis. 2d 266

But may require custodian to redact information not subject to disclosure before releasing record

Grebner v Schiebel
2001 WI App 17
240 Wis. 2d 551

- 3) Custodian, not requester, determines how records are copied

Lueders v Krug
2019 WI App 36, ¶ 16
388 Wis. 2d 147

If "electronic copies" specifically requested, that request must be honored

St ex rel Gehl v Connors
2007 WI App 238
306 Wis. 2d 247

- 4) Records retention policy may not be attacked under Public Records Law

§ 19.37(1n)
*St ex rel Auchinleck
v Tn of LaGrange*
200 Wis. 2d 585 (1996)

- 5) Notice of claim under § 893.80 not required

D. Authority may impose fees on requester

§ 19.35(3)(a), (b)

- 1) Cost may not exceed actual necessary and direct cost of reproduction

*Media Placement Servs,
Inc v Wis DOT*
2018 WI App 34
382 Wis. 2d 191

- a. Fee may be charged for online access to records

§ 19.35(3)(c)

- 2) May impose fee for locating record, not to exceed actual, necessary and direct cost, if cost is \$50 or more

*George v
Record Custodian*
169 Wis. 2d 573
(Ct. App. 1992)

- 3) No exemption as of right for indigents from payment of fees

§ 19.35(3)(e)

But authority may reduce or waive fee if "in the public interest"

§ 19.35(3)(f)
*St ex rel Hill v
Zimmerman*
196 Wis. 2d 419
(Ct. App. 1995)

- 4) Can require prepayment of fee or estimated cost if total exceeds \$5

§ 19.35(3)(f)

If requester is prisoner who failed to pay previous fee, may require prepayment of amount of both previous and current request

*Milwaukee Journal
Sentinel v City of
Milwaukee*
2012 WI 65, ¶ 22
341 Wis. 2d 607

- 5) Cannot charge for actual, necessary, and direct costs for reviewing and deleting nondisclosable information from responsive record

E. Preliminary judicial review before release of employee records

§ 19.356(2)

- 1) Custodian must give notice to employee record subject of impending request of the following employee-related records
 - a. Disciplinary investigation or record of violation of employment-related statute, rule, or policy

b. Record obtained through subpoena or search warrant

c. Record prepared by employer other than authority releasing record

§ 19.356(3), (4)

2) Subject of record may object within 5 days after notice and commence Ct action to restrain release of record within 10 days after notice

§ 19.356(4)

Requester of record may intervene as matter of right

§ 19.356(6), (7)

3) Ct may restrain authority from providing access to requested record

a. Ct to apply "substantive common law principles" construing right to inspect records in making decision

b. Generally requires "balancing test" (see *infra* Sec. G.)

c. Decision to be issued within 10 days after filing of action, unless extended for good cause; even if good-cause extension granted, Ct must issue decision within no more than 30 days after action filed

§ 19.32(1bg)

§ 19.356(9)

4) This procedure applies only to employees other than individuals holding local or state public office

Local and state public office holders entitled to notice of release and opportunity to augment record, but no provision for § 19.356 judicial review before release

Nichols v Bennett
199 Wis. 2d 268 (1996)
Hathaway v
Green Bay Sch Dist
116 Wis. 2d 388 (1984)

F. Presumption is disclosure of records unless there is:

1) Clear statutory exception. See *infra* G.3)

2) Common-law limitation. *See infra* G.4)

3) Overriding public interest in keeping record confidential. *See infra* G.2)

*Wis News Press v
Sheboygan Falls
Sch Dist*
199 Wis. 2d 768 (1996)
*Journal/Sentinel
v Aagerup*
145 Wis. 2d 818
(Ct. App. 1988)

G. Ct's two-part analysis in reviewing custodian's decision to deny access to records under § 19.35(1)(a)

1) Did custodian give specific reasons for denial

Tratz v Zunker
201 Wis. 2d 774
(Ct. App. 1996)

a. Ct will not consider reasons not asserted by custodian

*Journal/Sentinel
v Aagerup*
145 Wis. 2d 818
(Ct. App. 1988)

b. If public policy is basis for denial, custodian must state specific public policy reason for withholding record

- Unless statute leaves no room for explanation or discretion when applied to open records law

Chvala v Bubolz
204 Wis. 2d 82
(Ct. App. 1996)

c. If relying on statutory exception, mere citation to exemption statute is not sufficient

*St ex rel Savinski
v Kimble*
221 Wis. 2d 833
(Ct. App. 1998)

- Unless information requested is covered by an exempting statute that does not itself require a balancing of public interests

St ex rel Gehl v Connors
2007 WI App 238, ¶ 19
306 Wis. 2d 247

d. Failure to state purpose of request is not proper reason for denial

Beckon v Emery
36 Wis. 2d 510 (1967)

e. Ct must issue mandamus if custodian gives no reasons or insufficient reasons

*St ex rel Blum
v Bd of Educ*
209 Wis. 2d 377
(Ct. App. 1997)

- Unless record's confidentiality is expressly guaranteed by statute

Linzmeier v Forcey
2002 WI 84
254 Wis. 2d 306

§ 19.31
Newspapers, Inc v
Breier
89 Wis. 2d 417 (1979)

St ex rel Youmans
v Owens
28 Wis. 2d 672 (1966)

Law Offices of William
Pangman v Zellmer
163 Wis. 2d 1070
(Ct. App. 1991)

§ 19.35(1)
§ 19.85

§ 19.35(1)(i)
Levin v Bd of Regents
2003 WI App 181,
¶¶ 14-18
266 Wis. 2d 481

Madison Teachers, Inc
v Scott
2018 WI 11, ¶ 19
379 Wis. 2d 439
Milwaukee Journal
Sentinel v
Dept of Admin
2009 WI 79
319 Wis. 2d 439

MacIver Inst for Pub
Policy v Erpenbach
2014 WI App 49, ¶ 18
354 Wis. 2d 61

George v Knick
188 Wis. 2d 594
(Ct. App. 1994)

§ 19.36(1)-(13)

2) If specificity exists and public interest is claimed, Ct performs balancing test: Are custodian's reasons for withholding sufficient to outweigh strong public policy favoring disclosure?

a. Presumption is for disclosure

b. Answering this question usually requires preliminary in camera inspection of record by Ct

c. Whether harm to public interest outweighs public's interest in inspection is question of law

- Exemptions to public records/open meetings law are indicative of public policy

d. Identity and purpose of requester of records is not part of balancing test

e. Balancing test must be applied with respect to each individual record

f. E-mails to legislator, which relate to affairs of government, are public records

3) If statutory exception to disclosure claimed, balancing test inapplicable

a. Statutory exceptions to requests under § 19.35(1)(a) include

- Records exempted from disclosure under § 19.36(1)-(13)

§ 146.82(1)
§ 51.30

*La Crosse Tribune v
Circuit Ct
(In re St v Stanley)*
2012 WI App 42, ¶ 35
340 Wis. 2d 663

§ 757.93

§ 118.125

§ 968.26

*St ex rel Richards
v Foust*
165 Wis. 2d 429 (1991)

Nichols v Bennett
199 Wis. 2d 268 (1996)

*St ex rel Morke v
Record Custodian*
154 Wis. 2d 727
(Ct. App. 1990)

*George v
Records Custodian*
169 Wis. 2d 573
(Ct. App. 1992)

St v Panknin
217 Wis. 2d 200
(Ct. App. 1998)

*St ex rel Mitsubishi
Heavy Indus Am v
Cir Ct*
2000 WI 16
233 Wis. 2d 1

*Schill v
Wis Rapids Sch Dist*
2010 WI 86, ¶ 10 n4
327 Wis. 2d 572

§ 19.36(3)
*Juneau City Star-Times
v Juneau City*
2013 WI 4, ¶¶ 13-16
345 Wis. 2d 122

- Health-care records and mental health treatment records
- Conditional release plan for person found not guilty by reason of mental disease or defect and committed under § 971.17

- Judicial commission proceedings

- Pupil records

- John Doe proceedings

4) If common-law exception to disclosure is claimed, balancing test inapplicable

a. Prosecutor's closed case files

- But note: documents in file not integral to criminal investigation and prosecution process are not protected

b. Conviction records of inmates, when requested by prison inmate

c. Records of pending claims against the State

d. Judge's personal notes

e. Unfiled pretrial discovery materials generated in a civil action

f. Purely personal e-mails evincing no violation of law or policy

5) Law firm billings to insurer under Cty's policy must be produced but may be subject to redactions

§ 19.35(1)(am)

H. Records requests under § 19.35(1)(am)—Request by individual for own records

§ 19.35(4)(c)
Seifert v Sch Dist of Sheboygan Falls
2007 WI App 207
305 Wis. 2d 582

- 1) If inspection denied under § 19.35(1)(a), authority then determines right to inspection under § 19.35(1)(am)
- 2) Requester is individual seeking personally identifiable information pertaining to that individual in a record containing personally identifiable information maintained by an authority

Hempel v City of Baraboo
2005 WI 120
284 Wis. 2d 162

- a. Right to inspect is clearly limited to personally identifiable information about the requester

Hempel v City of Baraboo
2005 WI 120
284 Wis. 2d 162

- b. Affords requester rights in addition to those under § 19.35(1)(a)

Hempel v City of Baraboo
2005 WI 120, ¶ 55
284 Wis. 2d 162

- c. Purpose is to allow individual to determine what information is being maintained and whether it is accurate

Hempel v City of Baraboo
2005 WI 120, ¶ 52
284 Wis. 2d 162

- 3) Common-law exceptions to disclosure do not apply

Hempel v City of Baraboo
2005 WI 120, ¶ 27
284 Wis. 2d 162

- 4) Not subject to balancing test

- 5) Only the following statutory exceptions apply to limit disclosure:

§ 19.35(1)(am)1.

- a. Record of complaint or investigation that may lead to further proceeding

§ 19.35(1)(am)2.a.

- b. Record that would:

§ 19.35(1)(am)2.b.

- Endanger life or safety
- Identify confidential informant

§ 19.35(1)(am)2.c.

- Endanger security of prison or other listed facility

§ 19.35(1)(am)2.d.

- Compromise rehabilitation of inmate

§ 19.35(1)(am)2m.

- c. Actual address of participant in address confidentiality program established in § 165.68 for victims of abuse, stalking, and human trafficking

§ 19.35(1)(am)3.

- d. Part of "records series" not indexed for retrieval by name, address, or other identifier

I. Costs and fees of action

§ 19.37(2)

- 1) Prevailing requester entitled to reasonable Atty fees, actual costs, and not less than \$100 damages

*Journal Times v
City of Racine Bd*
2015 WI 56, ¶ 86
362 Wis. 2d 577

- a. Requester must show that prosecution of its mandamus action was causally related to release of record

§ 19.37(2)(a)
*Friends of Frame Park,
UA v City of Waukesha*
2022 WI 57
403 Wis. 2d 1

- b. Requester must prevail "in whole or substantial part"

*In re Denial of Costs in
Meinecke v Thyges*
2021 WI App 58, ¶¶ 21-
23, 399 Wis. 2d 1

- Obtaining a judicial order requiring access to public records meets "substantial" requirement

See CV 22, Sec. 1.D.

- In awarding fees and costs, "lodestar methodology" should be used

§ 19.37(2)(a)

- c. If requester is committed or incarcerated person, no minimum amount of damages

§ 19.37(3)

- 2) Punitive damages available if denial was arbitrary or capricious

*La Crosse Tribune v
Circuit Ct*
(In re St v Stanley)
2012 WI App 42, ¶¶ 60-
64, 340 Wis. 2d 663

- 3) Costs, fees, and punitive damages available only in mandamus action

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PROHIBITION

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CV 29: PROHIBITION

1. Definition	CV 29-1
2. Purpose	CV 29-1
3. Requirements for Remedy	CV 29-1
4. Non-Writ Procedure	CV 29-2
5. Writ Procedure	CV 29-3

1. Definition

Wis Const art VII,
§§ 4, 5, 8
§ 753.03, § 783.08-13
§ 752.01, § 752.02
City of Madison v DWD
2003 WI 76
262 Wis. 2d 652

Extraordinary remedy by which Circuit Ct, Ct of Appeals,
or Supreme Ct exercises superintending control of inferior
tribunals

2. Purpose

§ 783.08
St ex rel DPI v DILHR
68 Wis. 2d 677 (1975)
St ex rel Godfrey & Kahn,
SC v Cir Ct
2012 WI App 120, ¶ 48
344 Wis. 2d 610

In absence of other adequate remedies, to prevent judicial
or quasi-judicial tribunal or officer or state agency from
exceeding its jurisdiction or statutory authority

3. Requirements for Remedy

St ex rel Kiekhaefer
v Anderson
4 Wis. 2d 485 (1958)

A. Judicial or quasi-judicial tribunal or officer clearly exceeded its jurisdiction

City of Madison v DWD
2002 WI App 199
257 Wis. 2d 348
rev'd on other grounds
2003 WI 76
262 Wis. 2d 652

Duty of inferior tribunal must be plain and refusal to
perform or intent to proceed in violation of duty clear

St ex rel Kiekhaefer
v Anderson
4 Wis. 2d 485 (1958)

B. Judicial or quasi-judicial tribunal or officer committed nonjurisdictional error that causes extraordinary hardship to petitioner

St ex rel Kowaleski
v Dist Ct
254 Wis. 363 (1949)

- 1) Remedy traditionally reached only jurisdictional error,
not judicial error

*Drugsold v
Small Claims Ct*
13 Wis. 2d 228 (1961)
Keating v Inland Steel Co
(Petition of
Inland Steel Co)
174 Wis. 140 (1921)

- 2) Remedy may now be invoked when appeal may come too late for redress of nonjurisdictional error

St ex rel Lynch v Cty Ct
82 Wis. 2d 454, 460
(1978)

C. Lack of adequate alternative legal remedy

- 1) Relief by prohibition not available if adequate remedy by

*St ex rel Fieldhack
v Gregorski*
272 Wis. 570 (1956)
*St ex rel Employers Ins
v Office of Comm'r of Ins*
122 Wis. 2d 668
(Ct. App. 1985)

- a. Appeal or writ of error

In re Schumaker
90 Wis. 488 (1895)

- b. Proceedings in law or equity

St ex rel Schmidt v Gehrz
178 Wis. 130 (1922)

- c. Certiorari

St ex rel Dore v Stoltz
42 Wis. 2d 534 (1969)

- d. Habeas corpus

*St ex rel Furlong v
Waukesha Cty Ct*
47 Wis. 2d 515 (1970)

- Ct may treat claim for remedy of prohibition as one for habeas corpus relief in appropriate circumstances

St ex rel Chiarkas v Skow
160 Wis. 2d 123 (1991)

- e. Declaratory judgment

4. Non-Writ Procedure

§ 781.01

- A. Remedy of prohibition available as interim or final relief in action or proceeding governed by rules of civil procedure

§ 781.01

Use of non-writ procedure does not alter nature of remedy or scope of proceedings

5. Writ Procedure

§ 783.08

A. Application for writ

Petition of Heil
230 Wis. 428 (1939)

St v Wescott
194 Wis. 410, 415 (1927)

- 1) Application must be filed in same manner as for writs of mandamus
- 2) Petitioner must be party to proceedings in inferior tribunal
- 3) Petition must show that relator will be substantially prejudiced unless relief is granted

B. Allowance of writ

§ 783.08

§ 753.04

§ 783.09

- 1) If application shows sufficient cause, Ct issues writ commanding lower Ct and adverse party to
 - a. Desist from further proceedings in matter until day fixed and further order by issuing Ct
 - b. Show why they should not be permanently restrained from further proceedings
- 2) Formal writ must be returnable on date certain not more than 60 days from date of issue unless otherwise directed by Judge
- 3) Writ is served on Ct and adverse party in same manner as writ of mandamus

C. Return

§ 783.10

- 1) Unless writ has been quashed, respondent must make return within time specified in writ
- 2) Return constitutes answer to petition and is governed by same rules as pleadings in other civil actions

§ 783.10

3) Return is made by tribunal or officer whose proceedings are stayed by writ

a. Opposing party in proceeding below may adopt return by signed writing annexed to the return, thereby becoming Def

§ 783.11

b. If adverse party below does not adopt return, its sufficiency may be argued as on order to show cause

- Petitioner may submit affidavits and other proofs controverting allegations

D. Hearing

St ex rel Gaudynski
v Pruss
233 Wis. 600, 605 (1940)

Ct is not limited to record and may take additional evidence before rendering judgment

E. Judgment

1) Ct shall render judgment after hearing proofs and allegations of party

§ 783.12

2) Judgment for petitioner restraining lower tribunal is termed absolute writ of prohibition

§ 783.13

3) Judgment for respondent authorizing lower Ct and party to proceed is termed writ of consultation

SPEC PROCEEDINGS

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